Nos. 638, 639, and 641

NOV 29 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF TAMPA, FLORIDA, *Appellant*

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL.

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

~~APPLICATION FOR LEAVE TO FILE AS~~ AMICUS CURIAE, MEMORANDUM IN OPPOSITION TO ~~S~~ MOTIONS TO AFFIRM SUMMARILY

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APPLICATION FOR LEAVE TO FILE AS AMICUS CURIAE. MEMORANDUM IN OPPOSITION TO A MOTION TO AFFIRM SUMMARILY

The Public Service Commission of the State of Florida hereby moves this Honorable Court for leave, as *amicus curiae,* to file the attached memorandum in opposition to appellees' motions to affirm summarily

and urge this Court to give plenary consideration to that portion of the petitions seeking summary affirmance.

The reasons for the motion are:

(1) The Public Service Commission is vitally concerned about the effect of this merger on the entire State of Florida and is particularly concerned about the rail monopoly that will be created in central and western Florida.

(2) The District Court has stated in its opinion in this case that the merger will have its greatest impact on traffic originating and terminating in Florida and on traffic which is relatively immune from intermodal competition.

(3) The effect of the merger on transportation in the State of Florida will be considerable. The interest of the State of Florida in this case is substantial, and while we express no view as to whether or not the merger is in the public interest, we do submit that the importance of the case is such that the Court should note probable jurisdiction and give plenary consideration to the matter.

Respectfully submitted,

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MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM

The Interstate Commerce Commission has approved a merger that eliminates all rail competition below Jacksonville, Florida, except such competition by the Florida East Coast Railway as will exist on the east coast of Florida. The record indicates that the merged carrier will have approximately 81 percent of the rail trackage within the state.

The lower court opinion makes it clear that the approval of this merger will have serious effects on traffic originating and terminating in central and western Florida, a rapidly expanding economic area where the merging carriers are presently the only two railroads operating and where so much of their bulk loading traffic originates and terminates. This area accounted in 1957, the latest date for which figures are available in the record, for over $100,000,000 in freight revenues to the two carriers (Ex. R., pp. 70, 71). The record in the case shows that rail traffic originating and terminating at points in Florida common only to the two railroads amounts to more than 17,000,000 tons, and earnings to almost $60,000,000 (Ex. H. 213, pp. 1, 3). It is this traffic that will be affected by the proposed merger.

The record also shows that no rail competition will exist at points in central and western Florida at which 43,000,000 tons of traffic originate or terminate. Of this, 36,000,000 tons, or about 80 percent, is rail traffic and amounts to some 35 percent of the total tonnage of 102,000,000 tons carried by the two railroads (Ex. H. 36, Statement T; Ex. H. 38).

The lower court recognized the impact of this merger in Florida, stating that:

> "As shown by the record, these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." FEC App., p. 23a.

We believe that the Court should note probable jurisdiction and determine whether the Commission's findings comply with the requirements stated by this Court in *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1944).

The lower court has made it abundantly clear that water carriers will not supply competition with this merged railroad for this bulk loading traffic. The court also made clear that the effect of the rail monopoly that will be created in the carriage of these products, nearly all of which are crucial to the economy of Florida, will not be minimized by any intermodal competition. The court below said that "railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida" (FEC App., p. 20a). This Court should determine whether the Commission made adequate findings based on substantial evidence as to the effect of this merger on shippers and the public.

This is an important case, particularly to Florida; important issues are presented as to whether the Commission properly estimated the scope and appraised the effects of the curtailment of competition that would result from the merger.

While we take no position as to whether this merger should eventually be approved or rejected, we submit that this matter is worthy of plenary review by this Court and that the Court should therefore note probable jurisdiction.

Respectfully submitted,

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